APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 82—September Term, 1962

(Argued October 10, 1962 Decided November 14, 1962)

Docket No. 27649

UNITED STATES OF AMERICA, *Appellee,*

against

AMERICAN STEVEDORES, INC., *Defendant-Appellant.*

Before:

CLARK, MOORE and SMITH, *Circuit Judges.*

Appeal from a judgment of conviction following a jury trial entered by the United States District Court for the Southern District of New York, Thomas F. Croake, Judge, for violation of Internal Revenue Code of 1939, § 145(b); 26 U. S. C. A. § 7201. Affirmed.

SHELDON H. ELSEN, Assistant United States Attorney for the Southern District of New York (Vincent L. Broderick, United States Attorney for the Southern District of New York, on the brief; Martin R. Gold, and Arthur I. Rossett, Assistant United States Attorneys, of counsel), *for Appellee.*

JOHN T. REGES, Washington, D. C. (Julius G. Hirsch, New York, N. Y., on the brief), *for Defendant-Appellant.*

PER CURIAM:

Appellant, American Stevedores, Inc., a family-owned corporation, appeals from its conviction for willfully failing to report corporate income and for evading and defeating the taxes thereon in violation of Int. Rev. Code of 1939

§ 145(b); 26 U. S. C. A. § 7201. Appellant and its four sole stockholders, all brothers, three of whom were its principal directors, officers, and operators, were tried before a jury which acquitted the stockholders but convicted appellant. A fifth individual, the president of appellant and father of the stockholders, moved for, and was granted, a severance because of ill health. He has not been tried to date.

Appellant claims on appeal that the acquittal of appellant's principal operators precluded and/or made inconsistent the jury's conviction of appellant on these same charges.

We find no merit in this contention. The record shows ample grounds upon which the jury could have consistently arrived at both verdicts. The jury could have found that the tax frauds were committed on behalf of appellant by its comptroller, Walter Gans, acting within the scope of his employment. *United States* v. *Steiner Plastics Mfg. Co.*, 2 Cir., 1956, 231 F. 2d. 149, 153; *United States* v. *George F. Fish, Inc.*, 2 Cir., 1946, 154 F. 2d 798; *cert. denied* 328 U.S. 869 (1946). Gans, an employee of many years' standing, was appellant's internal accountant; as such he was given absolute discretion and authority over appellant's books. The personal expenses of the stockholders, carried on the books as corporate expenses and deducted in reporting its tax liability as business deductions, in part formed the basis of the violations charged. Appellant's contention that Gans did not have sufficient authority to bind appellant to a criminal act is belied by the affirmative evidence indicating that he had "carte blanche" over all financial matters. Appellant, by its directors, having given Gans such authority, may very well have been found to have condoned his illegal treatment of these items for their benefit. The effect of such condonation is not dissipated by appellant's use of independent accountants to fill out the actual returns.

The jury also may have found, contrary to appellant's claim, that its president was more than a mere nominal officer, and that he, who has not been tried as yet, either himself committed the illegal acts on behalf of appellant or directed Gans to so do.

Alternatively, even if the verdicts were inconsistent, it is well settled that consistency in these verdicts is not required. *United States* v. *Crosby*, 2 Cir., 1961, 294 F. 2d 928, cert. denied, sub nom. *Mittelman* v. *United States*, 368 U. S. 984 (1962); *Dunn* v. *United States*, 284 U. S. 390, 393 (1931).[1]

Affirmed.

[1] "The most that can be said in such cases is that the verdict shows that either in the acquittal or the conviction the jury did not speak their real conclusions, but that does not show that they were not convinced of the defendant's guilt. We interpret the acquittal as no more than their assumption of a power which they had no right to exercise, but to which they were disposed through lenity." (*Steckler* v. *United States*, 7 F. 2d 59, 60, 2 Cir., 1925.)

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court house in the City of New York, on the fourteenth day of November one thousand nine hundred and sixty-two.

Present:

HON. CHARLES E. CLARK,
HON. LEONARD P. MOORE,
HON. J. JOSEPH SMITH,
Circuit Judges

UNITED STATES OF AMERICA, *Plaintiff-Appellee*

v.

AMERICAN STEVEDORES, INC., *Defendant-Appellant*,

DIEGO CHIARELLO, ET AL., *Defendants*.

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed.

A. DANIEL FUSARO
Clerk

APPENDIX C

[1557] COURT'S CHARGE TO THE JURY:

There is one corporate defendant, American Stevedores, Inc., and four individual defendants, Gus Chiarello, James Chiarello, Richard B. Chiarello and Joseph Chiarello. As you were told earlier, Diego or Dick Chiarello was originally named in this indictment; however, he has been severed from this case and should no longer be considered by you as a defendant. Any evidence relating to Diego Chiarello received during the course of this trial should be considered by you only with relation to the other defendants.

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[1559] COURT'S CHARGE TO THE JURY:

And I am eliminating the name Diego Chiarello, even though you may take the indictment with you, and it appears there, as we are only concerned with the four defendants on trial—the defendants American Stevedores, Inc., and Gus B. Chiarello, James Chiarello, Joseph A. Chiarello and Richard C. Chiarello, vice-president, treasurer, employee-stockholder and secretary, respectively, of American Stevedores, Inc.

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[1577-1578] COURT'S CHARGE TO THE JURY:

There is also evidence that the individual defendants had no knowledge of the manner in which the financial records of the corporation were kept or the contents of the corporate tax returns. This evidence should be considered on the question of the knowing and wilful intent of the individual defendants. The individual defendants should not be charged with knowledge of the contents of the corporate tax returns or the financial records upon which much of the evidence is based, unless you find from the evidence that

such knowledge actually existed. But the defendants cannot close their eyes to obvious facts and claim ignorance. If you find, for example, from other evidence that the individual defendants continuously sent the personal bills to the corporation to be paid from corporate funds, then you may be entitled to draw the inference that these defendants had reason to know that personal expenses would be charged as business expenses, thereby resulting in the evasion of taxes due to the Government.

. . . . . .

[1580-1581] COURT'S CHARGE TO THE JURY:

I further instruct you that you may find that one defendant has the requisite intent, but others do not. You may also find that individual defendants are not guilty as charged but that the corporation is guilty by reason of the acts of other employees of the corporation who were authorized to act in relation to the financial affairs of the corporation. Your verdict with respect to the corporation is not necessarily controlled by your verdict as to the individual defendants.